7-458

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~1030~~ ~~689~~ ~~388~~ 93

JOHN W. BASS, PRESIDING JUDGE OF THE TAYLOR COUNTY COURT, PLAINTIFF IN ERROR,

vs.

HARVEY S. TAFT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED SEPTEMBER 1, 1887.

1 Proceedings of the circuit court of the United States for the district of Kentucky, at a regular term of said court, begun and held on Monday, February 21st, 1887, — the Honorable Howell E. Jackson, circuit judge of the United States for the sixth circuit and district of Kentucky.

HARVEY S. TAFT
vs.
JOHN W. BASS, the Presiding Judge of the County Court of Taylor County. } No. 5964.

Be it remembered that heretofore, to wit, on the 2nd day of February, 1887, came the plaintiff, by Wm. E. McAfee, his attorney, and filed in the clerk's office of our said court his petition for mandamus, which petition is as follows:

Circuit Court of the United States, Sixth Circuit and District of Kentucky.

HARVEY S. TAFT, Plaintiff,
vs.
JOHN W. BASS, the Presiding Judge of the County Court of Taylor County, Defendant.

2 The plaintiff, Harvey S. Taft, states that he is a citizen of the State of Michigan; that the presiding judge of the county court of Taylor county, Kentucky, viz., John W. Bass, is a citizen of the State of Kentucky, and that Taylor county, Kentucky, is a municipal corporation created by and under the laws of the State of Kentucky, and is a citizen of the said State of Kentucky; that heretofore, to wit, on the 4th day of October, 1881, he recovered a judgment in this court against the said county of Taylor for the sum of five thousand nine hundred and seventy-four and $\frac{98}{100}$ dollars, with interest thereon at the rate of six per cent. per annum from the 4th day of October, 1881, until paid, together with his cost in that behalf expended, which amounted to and were taxed at the sum of $51.92; that afterwards an execution of *fieri facias* was issued from the clerk's office of this court by the clerk thereof an- said judgment addressed to the marshal of the United States for the district of Kentucky, and while in full force and before the return day thereof was placed in his hands to execute, and was afterwards, to wit, on the 7th day of January, 1882, returned by him, in substance, "No property found." The plaintiff says his said judgment is in full force and unreserved and that no part thereof has been paid. The plaintiff

3 further states that heretofore, to wit: on the 21st day of February, 1882, he recovered another judgment against the county of Taylor, in this court, for the further sum of twelve hundred and fourteen and $\frac{96}{100}$ dollars, with interest at the rate of six per cent. per annum from the 21st day of February, 1882, until paid, and for his costs in that behalf expended, which amounted to and were taxed at the sum of $41.54; that afterwards an execution of *fieri facias* was issued from the clerk's office of this court by the clerk thereof, on said judgment, addressed to the marshal of the United

States for the district of Kentucky, and while in full force and before the return day thereof was placed in his hands to execute, and was by him returned in substance: No property found. Said judgment is in force and unreserved, and no part thereof has ever been paid. The plaintiff says that his said judgments were rendered on coupons for the payment of interest on the bonds issued by the said county of Taylor in payment of its subscription to the capital stock of the Cumberland and Ohio Railroad Company; that by the legislative enactment authorizing said subscription the county court was empowered and directed to levy annually and cause to be collected a tax sufficient to pay the interest on said
4 bonds, and that for the purpose of levying and collecting said tax the powers therein granted were vested in the presiding judge of the said county court; that he, the said plaintiff, has demanded of John W. Bass, the presiding judge of the Taylor county court, that he cause to be levied on the taxable property, real and personal, listed for taxation in said county of Taylor for the year 1887, a tax sufficient in amount to pay his said judgments and costs of collection, and that when levied he cause said tax to be collected from said tax-payers of said county; that the presiding judge aforesaid has refused and failed to make said levy and still refuses to make or cause said levy to be collected, and unless the writ of mandamus issue herein, commanding him to make said levy and collect said tax, he will be powerless to collect his said judgments, and the amounts thereof will be entirely lost; wherefore the plaintiff prays that the writ of mandamus be issued and directed to the presiding judge of the said county court of Taylor county, commanding him to levy, on the taxable property in said county of Taylor listed for taxation for the year 1887, an ad valorem tax sufficient in amount to pay plaintiff's debts, interests, and costs, includ-
5 ing the costs of collection, and that he cause said tax, when levied, to be collected from the tax-payers of said county and paid into court to satisfy plaintiff's debts. The plaintiff prays for all proper relief.

WM. E. McAFEE, *P. q.*

DODD AND GRUBBS and
D. W. SANDERS,
Of Counsel.

Wm. E. McAfee states — the plaintiff, Harvey S. Taft, is absent from the county of Jefferson and State of Kentucky, and that the statements of the foregoing petition are true, as he verily believes, and he says he is attorney for said plaintiff.

WM. E. McAFEE.

Subscribed and sworn to before me by Wm. E. McAfee this 1st day of February, 1887.

JOHN BARRET,
A Notary Public in & for Jefferson Co., Ky.

Upon which petition there issued the following process, to wit:

The President of the United States of America to the marshal of the Kentucky district, Greeting:

You are commanded to summon John W. Bass, presiding judge of the Taylor county court, to answer, on the first day of the next February term of the circuit court of the United States for the district of Kentucky, to be held at the city of Louisville, a peti-
6 tion against him in said court by Harvey S. Taft, and warn him that upon his failure to answer the petition will be taken for confessed, or he will be proceeded against for contempt; and you will make due return of this summons on the first day of the next term of said court.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Louisville, in the said district, this 2nd day of February, in the year of our Lord 1887, and of our Independence the 111th.

[SEAL.]

SAM'L B. CRAIL,
C. C. C., K. D.,
By HENRY CASSIN,
Deputy.

Upon which process the marshal made the following return, to wit:

Executed the within summons on John W. Bass, presiding judge of Taylor county court, February 3rd, 1887, by delivering to him a true copy thereof.

A. J. GROSS, *U. S. M.*,
Per J. M. TYDINGS, *S. B.*

The affiant, J. M. Tydings, the special bailiff to execute this writ, states that his return and endorsement made hereon is true; that he is over 21 years of age, and that he is not a party to nor interested in this action.

J. M. TYDINGS.

Subscribed and sworn to before me by J. M. Tydings this the 15th day of February, 1887.

——— ———.

And at a term of our said court, held for its October term
7 1886, to wit, on Wednesday, February 2nd, A. D. 1887, came the plaintiff, by Wm. E. McAfee, his attorney, and moved the court to grant unto him the writ of mandamus against the defendant as prayed for in his petition herein; and the said motion being heard and submitted it is ordered that the same be, and it is, sustained, and that the clerk of this court be, and he is hereby, directed to issue the writ of mandamus against the said defendant, commanding and enjoining him, in accordance with the prayer of the petition, to perform the duties devolving upon him as therein set forth, or show cause to the contrary on or before the 21st day of February, 1887.

Upon which order there issued the following writ of mandamus, to wit:

THE UNITED STATES OF AMERICA:

The President of the United States of America to John W. Bass, presiding judge of the county court of Taylor county:

Whereas it has been made to appear that Harvey S. Taft did, on the 4th day of October, 1881, recover a judgment in the circuit court of the United States for the Kentucky district against the county of Taylor for the sum of five thousand nine hundred and seventy-five and $\frac{95}{100}$ dollars, with interest thereon from the 4th day of October, 1881, at the rate of six per cent. per annum until paid, and
8 fifty-one and $\frac{92}{100}$ dollars, costs therein expended; and also that the said Taft did, on the 21st day of February, 1882, recover another judgment in the circuit court of the United States for the Kentucky district against the said county of Taylor for the further sum of one thousand two hundred and fourteen and $\frac{96}{100}$ dollars, with interest from the 21st day of February, 1882, until paid, at the rate of six per cent. per annum, and forty-one and $\frac{54}{100}$ dollars, costs therein expended, both of said judgments being on interest coupons on bonds of said county issued in aid of the Cumberland and Ohio Railroad Company; and upon said judgments executions issued and were placed in the hands of the marshal of said district and were by him returned, in substance, "No property found," and by the law of the State of Kentucky it was and is your duty to cause to be levied and collected a tax sufficient to pay the said judgments, interest and costs, and cost of collection on all the real and personal property in your said county subject to taxation under the revenue laws of Kentucky; and whereas you have neglected and refused to perform said duty and levy and cause to be collected said tax; and whereas the said Harvey S. Taft did, on the 2nd day of February, 1887, move the said circuit court of the United
9 States to grant against you, as presiding judge of said Taylor county court, a mandamus as prayed for in his petition filed herein; and whereas upon hearing the said motion the court did adjudge and order that a mandamus issue commanding as hereinafter directed: You are, therefore, hereby commanded and enjoined, without delay, on the receipt of this writ, to cause to be levied and collected a tax sufficient to pay said judgments in favor of said Harvey S. Taft against the county of Taylor for the sum of five thousand nine hundred and seventy-five and $\frac{92}{100}$ dollars, with interest from the 4th day of October, 1881, until paid, at the rate of six per cent. per annum, and fifty-one and $\frac{92}{100}$ dollars, costs and cost of collection of said tax; and also for the further sum of one thousand two hundred and fourteen and $\frac{96}{100}$ dollars, with interest thereon from the 21st day of February, 1882, until paid, at the rate of six per cent. per annum, and forty-one and $\frac{54}{100}$ dollars, costs therein expended and cost of collecting said tax, on all the real estate and personal property in Taylor county subject to taxation under the revenue laws of the State of Kentucky, including the amounts

owned by the residents of said county which ought to be given in under the equalization laws of said State, so that complaint
10 be not again made to said circuit court, and that you certify perfect obedience to this writ and due execution of the same to the said circuit court of the United States for the district of Kentucky, to be held on the third Monday in February, 1887. Hereof fail not at your peril, and have then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of our said circuit court, this 2nd day of February, 1887.

[SEAL.] SAM'L B. CRAIL, *Clerk*,
By HENRY F. CASSIN, *D. C.*

Upon which mandamus the marshal made the following return, to wit:

I appoint Joseph Tydings a special bailiff to execute the within writ of mandamus.
February 2nd, 1887.

A. J. GROSS,
U. S. M., Ky.

Executed the within mandamus on John W. Bass, presiding judge of the Taylor county court, February 3rd, 1887, by delivering to him a true copy hereof.

A. J. GROSS, *U. S. M.*,
P'r J. M. TYDINGS, *S. B.*

Affiant, J. M. Tydings, the special bailiff to execute this writ, states that his return and endorsement made on the writ hereto attached is true; that he is over 21 years of age, and that he is not a party to nor interested in this action.

J. M. TYDINGS.

11 Subscribed and sworn to before me by J. M. Tydings this 15th day of February, 1887.

——— ———.

And at a term of our said court held for its February term, 1887, to wit, on Monday, February 21st, A. D. 1887, came the plaintiff in each of the foregoing cases, by John Barret and Wm. E. McAfee, his attorneys, and filed in court a notice of a motion for a peremptory writ of mandamus duly executed, and moved the court for a peremptory writ of mandamus in accordance with the said notice; to which motion the defendant, by John W. Bass, objected; and thereupon the said defendant, by his attorney, filed his response to the alternative writ of mandamus. Whereupon came plaintiff, by his said attorneys, and filed a general demurrer to said response, and this case is passed until February 22nd, 1887, at 10 o'clock.

The response of the defendant above referred to is as follows:

Response.

The Circuit Court of the United States for the District of Kentucky.

HARVEY S. TAFT, Plaintiff,

vs.

JOHN W. BASS, Presiding Judge of the County Court of Taylor County, Kentucky, Defendant.

12 This day came John W. Bass, as presiding judge of the Taylor county court, and, for his answer to the writ of mandamus awarded against him herein, states that while it may be true that the plaintiff, Harvey S. Taft, did on the 4th day of October, 1881, recover a judgment in the circuit court of the United States for the Kentucky district against the county of Taylor for the sum of five thousand nine hundred and seventy-five dollars and $\frac{98}{100}$ dollars, with interest thereon from the 4th day of October, 1881, at the rate of six per cent. per annum until paid, and for fifty-one and $\frac{92}{100}$ dollars costs therein expended; and that he, the said Taft, also recovered another judgment in said court against said county on the 21st day of February, 1882, for the further sum of one thousand two hundred and fourteen and $\frac{96}{100}$ dollars, with interest thereon from the 21st day of February, 1882, until paid, at the rate of six per cent. per annum, and for forty-one and $\frac{54}{100}$ dollars costs therein expended, but avers that this defendant had no knowledge, information, or notice that such was true until this notice and writ of mandamus was awarded and served on him. Defendant, answering further, — that while it may be true that both of said judgments were rendered on interest coupons on bonds of said county
13 issued in aid of the Cumberland and Ohio Railroad Company, and that while it may be true that executions were issued on said judgments and placed in the hands of the marshal of said district and were by him returned, in substance, "No property found," as alleged by plaintiff, but denies that he had any notice or information that such proceedings were had thereon. For further answer the defendant states and avers that both of said judgments were obtained, if obtained at all, against said county long before he was elected, qualified, or acting as presiding judge of said Taylor county, Ky., and that all the proceedings had thereon were had prior to the commencement of his term of office as presiding judge of said county. Defendant, answering further, states and avers that he was elected judge of said county at the regular August election, held for the election of county officers, on the 7th day of August, 1882, and was duly qualified as such and executed bond as such as required by law and took the oath of office on the 4th day of September, 1882, which was long after said judgments were obtained and after said proceedings were had thereon, if had at all, as alleged by plaintiff.

The defendant, for further answer, states and avers that ever since his term of office begun as acting and presiding judge
14 of the Taylor county court, viz., on the 4th day of September,

1882, he has caused a tax to be levied, and levied a tax on all the real and personal property in said county subject to taxation under the revenue laws of Kentucky sufficient to pay all interest coupons on bonds of said county issued in aid of the Cumberland and Ohio Railroad Company, as the same a-crued or become due, and sufficient to pay for the collection of same, and sufficient to pay plaintiff's said judgments, interest, and costs, and cost of collection, as will be shown by the records of the orders of the Taylor county court. Duly certified copies of said orders will be filed herewith and made part hereof, marked, respectively, "A," "B," "C," & "D," if required. The defendant, answering further, states that in obedience to the writ of mandamus awarded against him herein that he has caused an order to be entered upon the records of the Taylor county court, making a levy of (86½) cents, eighty-six and one-half cents, on each one hundred dollars' worth of all the property, both real and personal, subject to taxation under the revenue laws of Kentucky in said county, which is shown by the assessor's book of said county to amount to $1,229,274.00, which said levy is amply sufficient to pay off plaintiff's said judgments, interest, and
15 costs thereon, and to pay for the cost of collecting the same. A certified copy of said order is filed herewith and made part hereof, marked "X." The defendant, for further answer, states that he entered an order upon the records of the said Taylor county court appointing J. P. Gaddie collector for Taylor county, who is a citizen of said county and a good and competent man, to collect said tax for the payment of plaintiff's said judgments, interest, and costs. A certified copy of said order is filed and made part hereof, marked "Y." The defendant states that the office of sheriff of Taylor county is now vacant and has been vacant since the year 1877 up to the present time, and for that reason he made the order appointing the said Gaddie collector as aforesaid. The defendant, for further answer, states that the law under which the said county's bonds were issued in aid of the said Cumberland and Ohio Railroad Company, and from which plaintiff's said debt emanated, does not confer upon the defendant, as presiding judge of said Taylor county, the power or authority to collect plaintiff's debt himself, nor to enforce the collection of same. It only confers the power and authority on him to levy a tax on the taxable property in said county sufficient to pay same and to
16 appoint a collector to collect same, if the office of sheriff be vacant, and defendant feels that he has fully discharged his duties in the premises as said presiding judge; wherefore he prays to be dismissed with costs and for all proper relief.

John W. Bass states that the foregoing statements are true, as he verily believes.

JOHN W. BASS.

Subscribed and sworn to by John W. Bass before me this February 21st, 1887.

SAM'L B. CRAIL,
U. S. Commissioner.

The Exhibit "X and Y," referred to in response, is as follows, to wit:

State of Kentucky, Taylor County Court. February Term, February 7th, 1887.

It is ordered by the court that for the purpose of paying the two judgments of $10,623.63, which includes interests and costs obtained by Harvey S. Taft in the circuit court of the United States for the Kentucky district, at Louisville, Kentucky, against Taylor county, on the 4th day of October, 1881, and on the 21st day of February, 1882, and for the cost of collection of same, that there be, and is hereby, levied a tax of 86½ cents on the one hundred dollars' worth of taxable property listed and returned by the assessor, E. B. Miller,
17 assessor of said county, for said year 1887, said amount — be levied and paid out of said taxable property for said year 1887; and J. P. Gaddie is appointed collector to collect and account for same, and is allowed 10 per cent. on said amount therefor.

A copy.

Attest: A. T. CAMPBELL,
Clerk Taylor County Court.

The demurrer above referred to is as follows, to wit:

Demurrer.

Circuit Court of the United States, Sixth Circuit and Kentucky District.

HARVEY S. TAFT, Plaintiff,
vs.
THE PRESIDING JUDGE OF THE TAYLOR COUNTY COURT, Defendant.

The plaintiff, Harvey S. Taft, demurs to the response of J. W. Bass, presiding judge of the Taylor county court, filed herein, and for grounds says that said response does not state facts sufficient to constitute or support a defense herein.

DODD & GRUBBS,
BARRET AND W. E. McAFEE,
D. W. SANDERS, *P. q.*

And at a term of our said court, held for its February term, 1887, to wit, on Tuesday, February 22nd, 1887, came the plaintiff, Harvey S. Taft, and moves the court to appoint the marshal of the
18 district of Kentucky to execute the mandamus herein and to collect from the tax-payers of Taylor county the taxes assessed and levied, for the purpose of paying the plaintiff's judgments herein.

And on another day of said term, to wit, on Wednesday, February 23rd, A. D. 1887, this action coming on to be heard on the pending motion and on the demurrer to the response of the defendant to the writ of mandamus herein, and being fully argued by counsel for both sides and submitted to the court, and the court being now sufficiently advised, it is now considered, ordered, and adjudged that so

much of the said response as relate- to the appointment of collector be, and it is, adjudged insufficient, and that the demurrer to that portion of the said response be, and it is, sustained. It is further ordered and adjudged that the motion for peremptory writ against the said defendant in relation to the appointment of a collector to collect the levies made by the said defendant and described in said response be, and it is, sustained to the said extent to which the defendant appears, objects, and excepts. It is further ordered
19 and adjudged that the motion made herein for the court to appoint the United States marshal for the district of Kentucky as collector to collect from the tax-payers and taxable property of said Taylor county the amounts severally assessed against them, under and in accordance with the terms of the said special levy made in obedience to the writ of mandamus herein, be, and the same is hereby, sustained, and the marshal is hereby appointed such collector; but this appointment will be suspended or rescinded whenever it is shown by the said defendant, Taylor County, that its or its appointees are willing and able to execute this judgment. Before proceeding to execute this judgment the said marshal is required to execute bond, with sufficient sureties, to be approved by the court, payable to said Taylor County, conditioned that he will faithfully and in proper time account herein for all moneys collected by him under the said levies. The said marshal will not proceed to act as such collector until the expiration of ninety (90) days from this date, but after the lapse of said period, if the defendant has not in
20 the mean time manifested its willingness and ability, through its own officials, to proceed in good faith to execute this judgment, then the said marshal will proceed, without further delay, to execute the same, and will continue the execution thereof until the same shall have been fully executed or until his appointment shall have been suspended or rescinded on the conditions hereinafter stated.

And afterwards, to wit, on 18th day of May, 1887, came the defendant, by his attorneys, and filed his appeal bond herein, which is approved by the court, and is as follows:

Know all men by these presents that we, John W. Bass, presiding judge Taylor county court, principal, and J. T. Caldwell, Jno. V. Turner, & others, sureties, are held and firmly bound unto Harvey S. Taft in the sum of six hundred dollars, to be paid to the said Harvey S. Taft, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 18th day of May, A. D. 1887.

Whereas the above-named John W. Bass, presiding judge of the Taylor county court, hath prosecuted a writ of error to the
21 Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such that if the

above-named John W. Bass, judge of the Taylor county court, shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN W. BASS,
Presiding Judge Taylor County Court.
R. E. PURYEAR,
WM. C. WEBSTER,
CHAS. PATTERSON,
THOMAS M. REED,
W. R. T. McFARLAND,
J. E. DURHAM,
J. T. CALDWELL,
L. VICTOR,
B. W. TUCKER,
NATHAN COX,
WM. P. SAXTON,
L. R. HASTINGS,
G. W. HAWELL,
C. H. BRAGG,
JO. H. MILLER,
W. F. CLARK,
D. B. MOORE,
ISAAC TATE,
F. P. GAINES,
GEO. LEE,
JAS. D. MILLER,
J. W. TATE,
W. W. INGRAM,
C. W. WRIGHT,
J. N. TURNER, &
JNO. A. WALFORD,
By JOHN W. BASS.

Sealed and delivered in presence of—
A. T. CAMPBELL,
Clerk Taylor County Court.

STATE OF KENTUCKY, }
County of Taylor, } *sct:*

I, A. T. Campbell, clerk of the county court for the county aforesaid, do certify that the names signed to the within bond makes said bond good and solvent in law for said amount and a large
22 amount in excess thereof, and that the written authority of said bondsmen to Judge John W. Bass to sign their names to this said bond is on file and of record in my office.

Given under my hand and seal of office this 18th day of May, 1887.

[SEAL.]
A. T. CAMPBELL,
Clerk Taylor County Court.

Approved:
HOWELL E. JACKSON,
Circuit Judge.

The power of attorney above referred to is as follows:

STATE OF KENTUCKY, *Taylor — :*

This written request and authority witnesseth :

That whereas it hath become necessary for Taylor county to execute an appeal bond—that is, a bond for the costs in the appeal of the defendant from the judgment of the U. S. circuit court at Louisville, Ky., in the consolidated mandamus cases of H. S. Taft *vs.* John W. Bass, as judge of Taylor county; James Edgar *vs.* Same, and Citizens' National Bank of Louisville, Ky., *vs.* Same, to the Supreme Court of the United States: Now, we, the undersigned, do hereby request, authorize, and direct John W. Bass, county judge of Taylor county, or A. T. Campbell, county clerk of Taylor county, to write, affix, and place our names in and to said bond or obligation, and when so done that it have, as far as we are concerned, the same virtue and effect as if done by us.

Witness our hands at Campbellsville, Ky., April 4th, 1887.

23

R. E. PURYEAR.
W. C. WEBSTER.
CHAS. PATTESON.
THOMAS M. READ.
W. R. T. McFARLAND.
I. E. DURHAM.
J. T. CALDWELL.
L. VICTOR.
B. W. TUCKER.
his
NATHAN x COX.
mark.

Attest:

R. E. PURYEAR.
WILLIAM P. SAXTON.
L. R. HASTINGS.
G. W. HAWELL.
C. H. BRAGG.
JO. H. MILLER.
W. F. CLARK.
D. B. MOORE.
ISAAC TATE.
F. P. GAINS.
G. W. LEE.
JAS. D. MILLER.
J. W. TATE.
WM. W. INGRAM.
C. W. WRIGHT.
J. N. TURNER.
JOHN A. WOLFORD.

DISTRICT OF KENTUCKY, *ss:*

I, Sam'l B. Crail, clerk of the district court of the United States for the district aforesaid, at Louisville, do hereby certify that the foregoing 23 pages, this included, contain a true and complete tran-

script of the record of the proceedings had in the court in the case mentioned in the caption hereof.

Witness my hand and the seal of said district court this 10th day of June, 1887.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

SAM'L B. CRAIL, *Clerk.*

24 [Endorsed:] Jno. W. Bass, presiding judge Taylor Co. court, pl'ff in error, *vs.* Harvey S. Taft, def't in error. Transcript.

25 UNITED STATES OF AMERICA, *District of Kentucky*, } *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the Kentucky district, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Harvey S. Taft, plaintiff, and John W. Bass, presiding judge of the Taylor county court, defendant, a manifest error hath happened to the great damage of the said John W. Bass, presiding judge of the Taylor county court, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the first day of the next October term in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Louisville, in said district, this 18th day of May, A. D. 1887, and of the Independence of the United States the 111th.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

SAM'L B. CRAIL,
C. C. C., K. D.

Allowed by—
HOWELL E. JACKSON,
Circuit Judge.

26 UNITED STATES OF AMERICA, *District of Kentucky*, } *ss:*

To Harvey S. Taft, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at Washington, on the

10th day of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the said district of Kentucky, wherein John W. Bass, presiding judge of the Taylor county court, is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 18th day of May, in the year of our Lord 1887, and of our Independence the 111th.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

HOWELL E. JACKSON,
Circuit Judge.

27 [Endorsed:] Jno. W. Bass, presiding judge, &c., pl'ff in error, *vs.* Harvey S. Taft, def't in error. Citation. Wm. E. McAfee.

Executed the within on Harvey S. Taft by delivering a true copy of the within citation to Wm. E. McAfee, attorney for said Harvey S. Taft, at Louisville, Ky., this June 10th, 1887.

A. J. GROSS, *U. S. M.*,
By J. V. McDONALD, *D. M.*

Marshal's fees, to serving 1 copy, $2.00.

28 *Assignment of Errors.*

Supreme Court of the United States.

JOHN W. BASS, Presiding Judge of the Taylor County Court, Appellant,
vs.
HARVEY S. TALFT, Appellee.

Now comes John W. Bass, presiding judge of the Taylor county court, and asks a reversal of the judgment of the circuit — of the United States for the district of Kentucky, rendered February 23d, 1887, and for cause therefor assigns the following errors:

1st. The court erred in not sustaining the demur-er to the response to the petition filed by the plaintiff, because the facts stated in the petition are not sufficient to constitute a cause of action.

29 2d. The petition alledges that it was the duty of the Taylor county court to levy annually a tax sufficient to pay the interest on the subscription of the county, and shows that coupons sued for were due long prior to the year 1887, and does not alledge that the county court had not levied and collected a tax for the year the coupons represent interest on the subscription sufficient to pay the same, and had not since said time levied and collected said tax.

3d. The petition does not alledge that there was no sheriff and no "other person authorized to collect the State revenue" had been appointed by the county court, and no "special collector" of railroad tax had not been appointed.

4. The court erred in sustaining the demur-er to so much of the response of the county judge as relates to the appointment of collector and in adjudging the same insufficient.

30 5th. The court erred in sustaining the motion for a peremptory mandamus "in relation to the appointment of a collector to collect the levies made by the defendant and described in the response."

6th. The court erred in appointing the United States marshal a collector to collect the taxes levied under the statutes of Kentucky on the people and property in Taylor county.

7th. The court erred in enforcing the collection of taxes levied under the authority of these acts to pay interest on the coupons upon the judgment and to pay the costs of the suits.

8th. The court erred in rendering any judgment except compelling the county judge to perform his duty as required by the law.

9th. The court erred in rendering a judgment against
31 Taylor county. It was not before court; for which errors and any others which the superior judgment of the court may detect he prays that said judgment be reversed and the petition of the complainant dismissed.

JOHN W. BASS,
Presiding Judge of the Taylor County Court,
By PHIL. B. THOMPSON, JR.,
Attorney.

Endorsed on cover: Kentucky C. C. U. S. No. 1030. John W. Bass, presiding judge of the Taylor county court, plaintiff in error, *vs.* Harvey S. Taft. Filed September 1, 1887.

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SUPREME COURT OF THE UNITED STATES.

JOHN W. BASS, *Presiding Judge of the Taylor County Court, Appellant,*

vs.

HARVEY S. TAFT, *Appellee.*

Brief of Appellant.

PHIL. B. THOMPSON, JR,
Attorney for the Appellant.

R. O. POLKINHORN, PRINTER.

SUPREME COURT OF THE UNITED STATES.

JOHN W. BASS, *Presiding Judge of the Taylor County Court, Appellant,*

vs.

HARVEY S. TAFT, *Appellee.*

Brief of Appellant.

The appellant, John W. Bass, who is the Presiding Judge of the Taylor County Court says, that in the judgment rendered by the United States Circuit Court, on February 23d, last past, against him, in certain mandamus proceedings had before said court, that grave errors were committed by the court affecting the substantial rights of himself and of the other people of Taylor County, whom he represents, which errors he has assigned upon the record, and begs leave to exhibit the same in this brief.

The first error assigned by the appellant is that—

"The facts stated in the petition do not constitute a cause of action, and that the demurrer to the response should have been sustained to the petition."

This is necessarily so, for if the demurrer was sustained to the response, the question would arise, can judgment be rendered for the complainant on the

facts stated in his petition; and, if not, the petition should and would be dismissed?

So it was held in *Marten* vs. *McDonald*, 14 Ben. Mon., 547, and *Young* vs. *Duhme*, 4 Met., 242, (Kentucky Reports):

"A demurrer to a pleading presents all previous pleadings for the consideration of the court, which should decide against the party committing the first fault."

And in *Mitchell* vs. *Matingly*, 1st Met., (Ky. Reports), page 237:

"Held substantially the same, excepting that a demurrer waived all other defects except want of jurisdiction on the part of the court, and that the petition did not state facts sufficient to constitute a cause of action."

In order to a full understanding of the case, I quote from the act incorporating the Cumberland & Ohio Railroad Co. and amendments thereto such parts as appear to be necessary.

Section 15 of the act of February 24th, 1869, Session Acts, 1869, Vol. 1, page 470, provides:

"That any city, town or county through which said proposed road shall pass, is hereby authorized to subscribe stock in said railroad company." * * * "All said bonds shall be payable to bearer with coupons attached, bearing any rate of interest not exceeding six per cent. per annum *payable semi-annually in the city of New York* * * * the County Court having jurisdiction in any such county that may subscribe for stock in said railroad company are hereby authorized and required to levy *annually* and collect a tax upon taxable property in their respective cities, towns and counties, as listed and taxed under the *revenue laws* of this State, *a sufficient sum to pay*

the interest on said bonds as it accrues, together with the cost of collecting the same. * * * They may establish a sinking fund, &c. * * * The person collecting said tax shall give tax receipts for the same, and any tax payer paying tax to said road under the provisions of this act shall be entitled to stock in said railroad company to the amount of taxes he may pay, * * * and whenever such receipts to the amount of one share or more shall be presented to the company, or an officer or agent designated by it, a certificate of stock shall be issued for fractional part of share * * * *Provided*, * * * the holders of stock issued on such receipts as aforesaid shall be entitled to the same dividend and to all the rights and privileges as the original and cash stockholders. *And provided further*, 'That said company may in any way that may seem expedient to it provide for and pay each and any year to the cities, towns or counties, or any of them, the amount of tax levied by reason of said bonds, and thus stop the collection of tax for that year. * * * *And provided further*, * * * the County Court * * * may appoint collectors for said tax, or may require the sheriff * * * to collect the same, all of whom shall have the same powers and remedies and shall proceed in the same way for the collection of said tax as the sheriffs in the collection of State revenue. * * * "If the collections are made by the sheriffs * * * they shall settle and pay over the tax at the same times that sheriffs are required to pay the State revenue, and for their services in collecting, they shall in no case be allowed more than three per cent. commission on the amount collected."

Tax receipts exchanged for stock.

Collectors to be appointed.

Commissioners for collecting.

On the 11th day of March, 1870, (see Session Acts, Vol. 2d, p. 226, Ch. 610, Sec. 4), the charter of the Cumberland and Ohio Railroad was amended, so that it was provided—

"The Sheriff of the County in which said tax shall be levied shall collect the same at the same time he

Amendment, 1870. Sheriffs to be the collectors.

collects the State revenue and be allowed the same commissions therefor, and shall settle for and pay the same to the *treasurer of said company* at the time he is required by law to pay over the county levy, and he and his official securities on his official bond shall be responsible for the same and for the same damages for a failure to collect, or non-payment of the same, that sheriffs are by law liable for on account of not paying over the State revenue to be collected in the same way." * * *

Section 9 fixes a penalty of ten per cent. damages for non-payment by the sheriff of these taxes to the company.

Section 10—

Powers in collecting tax.

"That sheriffs and all other officers having in their hands taxes levied under said act of incorporation and this amendment thereto shall use all the remedies and exercise all the powers of destraining and selling personal property which sheriffs are authorized to use in the collection of State revenue," &c., &c.; the section then provides "the manner of levying upon, selling and redeeming land, &c., and to pay taxes."

(The other officers referred to in this section are marshals of cities and towns, or collectors appointed in cities or towns.)

Section 12 provides—

Property to be taxed same as for State revenue.

* * * "The County Court * * * shall *annually* levy a tax upon all the property in such * * * county subject to taxation for State revenue * * * sufficient to pay the interest on said bonds when due, and the principal thereof at maturity."

Section 18 provides that the coupons on the bonds shall be received in payment of taxes by the counties, &c., &c. Coupons to be received in payment of taxes.

The charter of the company was further amended February 13, 1872, Sessions Acts, 1871–2, vol. 1, page 315, chapt. 265, section 3, which provides, that the county *shall* appoint three sinking fund Commissioners, their term office, &c., &c. Amendment of Feb. 13, 1872. Sinking Fund Commis'rs.

Section 4—

"That the sheriff of any county or other officer who shall collect the taxes levied as aforesaid, shall pay over the same to said Commissioners of the sinking fund; and said Commissioners shall see that the sheriff or other officer collects and pays over according to law the said taxes levied as aforesaid, and shall institute legal proceedings against him in case of failure. They shall apply the taxes collected, if any, to pay cash subscriptions to the payment of the same at the principal office of said company, and they shall appropriate the taxes levied to pay interest on the bonds issued in payment of subscriptions in payment of such interest at the city of New York," &c., &c.

Section 8 introduces a new feature into taxation "under the revenue laws for the collection of State revenue," by taxing the lands of non-residents of a county, and directing how *the sheriff* is to collect the tax and sell the lands in default of payment.

The act incorporating the Cumberland and Ohio Railroad Company was further amended March 11th, 1873, Sessons act 1873. Vol. 1, page 479, Chapt. 375. Amendment, March 11, 1873.

Section 1. It shall be the duty of the respective County Courts of the counties or districts of counties that have issued or may hereafter issue bonds

Annual levy at Apr. or May Term to pay one year's interest.

in payment of subscriptions to the capital stock of the Cumberland and Ohio Railroad Company, *annually*, at the April or May term of said court, to levy a tax on the property of said county or district of county subject to taxation for revenue purposes, sufficient to pay one year's interest on said bonds.

"Provided, that if from any cause such tax is not levied in said months, the same may be levied at any subsequent term of said courts."

Sheriff or other person collecting State revenue to be collector.

Section 2. "It shall be the duty of the sheriff *or other person collecting the State revenue* in each county or district of county, in which a tax shall be levied for the purpose of the foregoing section, to collect said tax, and pay over the same to the sinking fund commissioners for his county or district, on or before the first day of December in each year, and may pay the same in monthly installments, commencing on the 1st day of June in each year; and upon his failure to collect or pay over such tax as required herein, he and his securities upon his official bond shall be liable for the same, and ten per cent. thereon, to be recovered upon motion of the sinking fund Commissioners or any holder of any bond of such county or district in the county of his county, ten days notice of said motion having been 'first' given. Provided, however, that if the County Court shall appoint a special collector of said tax, other than the sheriff, and such 'appointed' shall qualify, 'the sheriff shall not be required to collect the tax for that year'."

Duties.

Special collector, when?

Compensation

Section 3. Says collectors shall receive such compensation as county may allow, not exceeding six per cent., to be retained out of the sum collected.

Sec. 4. If sinking fund Commissioners are not appointed or fail to act, the Sheriff or Collector

shall pay out and invest taxes as they are directed to do.

These seem to be the material provisions of the law for the levy collection, and payment of taxes to meet the interest on the subscription of the county.

The duty of the County Court in regard to levying the tax is that it shall levy it *annually*, "to pay the interest on the bonds for that year." It is manifest that by the provision that the company might pay the interest on the bonds to the county and stop the tax for that year, that it was never intended that interest should run on and accumulate and a tax covering several years be laid at once. Nor was it intended that a separate levy should be made for every bondholder, but only one tax was authorized to be levied by the County Court and that one tax was to pay all the interest on the subscription for the year and such a portion of the principle as the court affixed for the sinking fund.

The presumption is that the County Court of Taylor County had annually, for all years, prior to 1887, levied a tax on all property in Taylor County, subject to taxation for State revenue, sufficient to pay the interest for each year that this tax was collected by the sheriff, and paid over to the Commissioners of the sinking fund.

There is no allegation that this is not true, and, if true, the County Judge is not in default.

It may be true, as alleged—"That plaintiff has demanded of John W. Bass, Presiding Judge of the Taylor County Court, that he cause to be levied on the taxable property, real and personal, listed for taxation in said County of Taylor for the year 1887, a tax sufficient in amount to pay his said judgments

and costs of collection and that the Presiding Judge aforesaid has refused and failed to make such levy, and still refuses to make or cause said levy to be collected" &c., but this does not show the County Court to be in default.

In making these levies the County Court is a court of limited jurisdiction and can only do what the statute authorizes.

"The power to tax is a high governmental power and when the legislature grants it to another tribunal it can only be exercised in strict conformity to the terms in which the power is granted, and a material departure will be fatal to the attempt to exercise it." (8 Bush, 208; 10 Bush, 724, Ky. Reports.)

The failure or refusal of the County Judge to levy a tax for back years, in the absence of an allegation that it had not been levied for those years, must be approved as correct, and is not a refusal to perform a manifest duty.

2d. The petition was filed on February 2d, 1887. The law provides that the County Court shall make the levy in the months of April or May for that year, and in case of failure to make it at that time, at any court thereafter. (see act of March 11, 1873, proviso Sec. 1st, *supra*.)

The County Judge was not in default in levying a tax for 1887, until April and May had passed, and this complaint was February 2d.

"Mandamus will not lie to compel the doing of an act the performance of which is not then due." (Heigh on Extraordinary Legal Remedies, § 36.)

3d. The demand upon the County Judge was premature, because the assessor books are not filed with the County Clerk until the 1st day of May, which exhibits to the County Judge the taxable property of the county on which he is to lay the tax. (General Statutes of Ky., 1883, Chap. 92, Article 5, § 4, page 719.) He cannot levy intelligently the tax until the amount of property is ascertained on which it is to be levied. Demand premature.

A large portion of the property did not have to be listed until after April 1st. (§ 15, General statute, *supra.*)

The rate of taxation to produce a certain sum is regulated by the other factor, the amount on which the levy is laid. Therefore, the legislature wisely provided that the County Court should not levy the tax until the assessor's returns were filed showing the amount of taxable property, viz., after April or May.

4. The demand on the County Judge, and on which he is alleged to have defaulted was "that he cause to be levied on the taxable property, real and personal, listed for taxation in said county of Taylor for the year 1887, &c., &c." No power to levy on real and personal property.

A. No property was at the time listed for 1887.

B. The statute directs the tax to be levied "on the property of the county subject to *taxation for State revenue.*" There is a great difference between "the property of the county subject to taxation for State revenue," and "the real and personal property listed for taxation."

State revenue reaches all choses in action under what is known *as the equalization law*—not simply the *real and personal property listed for taxation.* (General Statutes, Ky., p.)

5th. The demand was that he levy a sufficient sum to pay the complainant's debt, interest and costs.

No power to levy for interest on coupons or costs.

This the county judge had no power to do under the statute. He could only levy annually a tax to pay the interest on the subscription for that year, with such an amount for the sinking fund as he affixed. He is not allowed to levy a tax to pay *interest* on the coupons if defaulted upon, or to pay *costs if proceedings are had*. He has no power to levy to pay the judgment of any court, only to pay the interest, and no more.

This is rendered more apparent by the fact that the tax-payer is entitled to stock for the amount of the subscription of the county paid in taxes by him. Interest on interest is no part of the subscription, and the issue of stock to tax-payers cannot be increased by this amount. Costs are no part of the subscription, and stock cannot be issued upon tax receipts in part payment of costs. If so, the rail road is compelled to pay in stock the costs laid upon the defaulting county. Suppose the costs amounted in this case to one hundred thousand dollars, then every tax-payer's receipt from the collector would embrace a part of it, and when all the receipts were funded into the stock the unfortunate railroad company would issue one hundred thousand dollars worth of stock to make good the default of the subscriber.

This is an extreme presentation to exhibit the absurdity of the position.

The claim of the plaintiff for his interest on his judgment and his costs, are but claims against the county to be paid out of its ordinary revenues pro-

vided by law for the payment of county claims, and cannot be levied for under these statutes.

So, we find again, that the County Judge is not in default on the charge made in the petition.

The 2d error assigned is that the petition does not allege that the County Court, the year the coupons were due, had failed to levy an annual tax upon the property of Taylor County, subject to taxation for State revenue, sufficient to pay the interest for that year on their suscription to the railroad, and had never levied or collected such tax since that time.

The judgment and return of *nulla bona* does not negative the laying and collection of such a tax.

Suppose it was levied and collected the presumption is that it was, and there is no allegation it was not, then the money collected was paid into the hands of the sinking fund Commissioners, whose duty it was to pay it out in the city of New York to the coupon holders for that year. Yes, but says plaintiff, I was there waiting for my money, and did not get it. Then your judgment only shows that the sinking fund Commissioners have your money and your cause of action is against them. It is the duty of the petitioner to make out a cause of action against the party proceeded against and in mandamus, he must by allegation negative all other remedies, for mandamus is only allowed as writ of last resort, to prevent a failure of a right for which there is no other remedy. There is no allegation in this case inconsistent with the fact that this money is already collected and in the hands of the sinking fund Commissioners for complainant's use.

The 3d error assigned is that the petition is defective in not alleging that the sheriff's office was vacant

and that the County Court had failed to appoint a revenue collector, or to appoint a special collector for the railroad tax.

The 2d section of the act of March 11, 1873, *supra*, provides:

Is he to collect?

"It shall be the duty of the sheriff *or other person collecting the State revenue* in each county or district of county, in which a tax shall be levied for the purpose of the foregoing section, to collect said tax," &c. * * *

The original act of incorporation provided:

* * * "The county court * * * may appoint collectors for said tax or may require the sheriff * * * to collect the same." (Act Feb. 24, 1869.)

This was followed by the act of March 11, 1870, section 4:

"The sheriff of the county in which said tax shall be levied shall collect the same," &c. * * *

This express law repealed *protanto* the act allowing the County Court to appoint a collector, and after that it had no power to appoint one until the act of 1873, *supra*. No one had any right or power to collect this tax except the sheriff until 1873, when the law provided "that the sheriff *or other person collecting the State revenue*," should collect it. Who is the other person collecting the State revenue?

The General Statutes, 1883, page 730, chap. 92, art. 8, sec. 1, provides:—

"The sheriff, by virtue of his office, shall be collector of the revenue. If he fail or refuse to execute

bond with surety, as provided by law for the collection of the revenue, he shall forfeit his office." * * *

Appointment of Collector of State revenue.

"Sec. 2. When the sheriff fails to give bond for the collection of the revenue, the County Court shall appoint a collector of the revenue for that year. * * * Such collector shall be governed by the laws regulating the duties of sheriffs in the collection of the revenue." * * *

Then the other person is a "collector of State revenue," appointed by the county court, when the sheriff fails to qualify.

In order to invest the County Court with authority, the sheriff must fail "to give bond," and before any default can be laid upon the County Court, it must be so alleged "that the sheriff failed to give bond" and the court failed *to appoint a collector of State revenue.* Can the plaintiff allege in this case "that the sheriff failed to give bond?" Can he allege that "a collector of State revenue" was not appointed, whose duty it was under the law to collect the tax? Now, then, comes the provisor, "that if the County Court does appoint a special collector, and he appears and qualifies, the sheriff shall be excused for that year."

But, suppose there is no sheriff and there is a collector of State revenue, whose duty it is to collect these taxes, is the County Court in default for not appointing a special collector so that the sheriff that is not may be excused for that year?

All complainant is entitled to is, that some one authorized to collect these taxes shall be in office, and before he can maintain mandamus against the County Court he must allege that no one authorized to collect these taxes is in office, and that it is the

manifest duty of the County Judge to appoint one.

We hold that if there was either a sheriff or collector of State revenue in existence, that if the County Court has any power, it is purely discretionary whether it will appoint a special collector to perform a duty enjoined by law upon other officers, which discretion cannot be controlled by any other court. That one collector of these taxes is all plaintiff can demand, and he does not allege that one is not in existence. His petition is fatally defective.

Therefore the 4th error assigned is well taken; there is nothing in the record to show that the county had not appointed a collector of the State revenue, who, *ex-officio*, become the collector of railroad tax, and even if he had not, he did appoint John Gaddie Special Collector, which exhausted his power and authority. Therefore his response was sufficient on this point.

The 5th and 6th errors assigned may be considered together as presenting broadly the power and jurisdiction of the Circuit Court of the United States for the District of Kentucky, in a mandamus case, to appoint the United States Marshal, a collector, to collect taxes levied by authority of the State, by a municipal corporation, to pay interest on its subscription to a railroad company, either where there is a vacancy in the office of collector or where such officer exists, and is not before the court.

This question is not new before the court for the first time. It has been considered often and fully, and on each and every occasion has been decided in the negative.

The case of *Thompson* vs. *Allen County Court (Kentucky)*, arising out of a subscription to the

same railroad, under the same law, decided November, 1885, Justice MILLER delivering the opinion of the court, found in Vol. 115, U. S. Report, pages 550 to 565 inclusive, will throw much light upon the subject, as the cases upon which appellee must rely were then carefully and ably reviewed by the learned judge.

In that case Thompson had a judgment against Allen County, return of *nulla bona*, had proceeded by mandamus, and compelled the levying of a tax to pay his debt, and the appointment of a collector by the County Court, who failed to qualify.

Up to this point the case is identical with the one at bar.

Thompson then filed his bill in equity, asking the appointment of a receiver to collect the taxes, or other similar order, by the court of equity.

Taft, in this case, asks the United States Marshal be appointed collector, and under the authority of the common law court, collect and account for the taxes, which order was made. Thompson's order was denied by the lower court, which denial was affirmed by this court.

We may lay it down as the settled doctrine of this court, that mandamus is the appropriate remedy to compel a municipal corporation to levy and collect a tax authorized by the Legislature, to pay interest on bonds issued by authority of the State. (65 U. S., 735, 62 U. S., 208, 11 Wheaton, 22.)

In 19th *Wallace*, *Heine* vs. *Board of Levee Commissioners*, Justice MILLER said, (page 657):

"It has been decided in numerous cases founded on a refusal to pay corporation bonds, that the ap-

propriate proceeding was to sue at law, and by a judgment of the court establish the validity of the claim, and the amount due, and by a return of an ordinary execution, ascertain that no property can be found liable to such execution to satisfy such judgment. Then if the authority existed for the corporation to levy and collect taxes for the payment of the debt, a mandamus would issue to compel them to raise, by taxation, the amount necessary to satisfy the debt." (Cited as authority, 71 U. S. 419; 71 U. S., 403; 6 Wallace, 166; 5 Wallace, 705; as especially 6 Wallace, 481; 73 U. S., 930.)

Mandamus appropriate to compel levy & collection of tax.

This remedy the appellee followed. He proceeded far enough to get exactly in the position of thousands of others who have preceeded him when the time came for the tax to be levied, or, if levied, to be collected, the offices were vacant, and the question was not a new one. "What are you going to do about it?

Rees vs. *Watertown*, 19th Wallace pp. 107 to 125. Rees went through suit, judgment, execution, three mandamuses, to compel the levy of a tax, he found at last vacant offices in his way. So he filed a bill in equity, asking the court "to direct the marshal to seize the property of the citizens," and apply it to the payment of his debt. Mr. Justice HUNT dismissed his bill, saying:

"We are of the opinion that this court has not the power to direct a tax be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, for public purposes only; second, by *the power of legislative authority only*. It is a power which has not been extended to the judiciary. Especially is it beyond the power of the federal judiciary to assume the place of the

The Court no power to levy.

State in the exercise of this authority at once so delicate and so important."

The learned judge then discussed the case, *Supervisors* vs. *Rogers*, 7th Wallace, 175. (74 U., S. 162), in which the Marshal in a mandamus case was appointed a commissioner to levy a tax upon the taxable property of the county, and declared that the *Supervisors* vs. *Rogers* was not authority for such action generally that it was decided upon a provision of the Iowa statute regulating mandamus proceedings which expressly authorized a commissioner to be appointed to perform the act which *the defendant refuses* to perform.

Supervisors v. *Rogers*, not authority.

Now, mark you, the legislature of Iowa clothed the judiciary with this power by express statute, where the officer was *in existence* and refused to obey the process of the court. But suppose the office had been vacant even under the Iowa statute, could the court have appointed a commissioner? Not much. The commissioner could only do what the officer refused and after his refusal.

The judge then says, In Rees vs. *Watertown*, *supra*:

"The State of Wisconsin, of which Watertown is a municipal corporation, has passed no such act. The case of *Supervisor* vs. *Rogers* is therefore no authority. The appropiate remedy is a writ of mandamus, *Riggs* vs. *Johnson & Co.*, 6 Wallace, 193. (73 U. S. Vol. 18, 775.) This may be repeated as often as occasion requires. It is a judicial writ, a part of a recognized course of legal proceeding. In the present case it has been thus far unavailing, and the prospect of its future success is perhaps not flattering. However this may be, we are aware of *no au-*

Court cannot appoint its own officers to levy or collect

thority in this court to *appoint its own officer* to execute the duty thus neglected by the city, in a case like the present."

The question of the power of the Federal Court to appoint an officer to levy and collect taxes under State authority was again considered and denied in the case *Heine* vs. *The Board of Levee Commissioners*, 19 Wallace, pp. 655 to 661. (86 U. S. Reports, Vol. 22, p. 224.)

Justice MILLER said:

Fed'l Court no power to levy or collect

"The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the Legistative Sovereignty, State or National. In the case before us the National Sovereignty has nothing to do with it. The power must be derived from the legislature of the State. So far as the present case is concerned, the State has delegated the power to the Levee Commissioners. If that body has ceased to exist, the remedy is in the legislature either to assess the tax by special statute or vest the power in some other tribunal. It is not vested as an original jurisdiction in any Federal Court. It is unreasonable to suppose that any legislature would ever select a Federal Court for that purpose. It is not only not one of the inherent powers of the Federal Court to levy and collect taxes, but it is an invasion by the judiciary of the Federal Government of the legislative functions of the State Government. It is a most extraordinary request and a compliance with it would involve consequences no less out of the way of judicial proceedure, the end of which no wisdom can foresee. In the cases of *Walkley* vs. *Muscatine* and *Rees* vs. *Watertown*, already cited, we have distinctly refused to enter upon this course and we see no reason in this case to depart from the well considered judgment in those cases, especially the latter."

This brings us to the consideration of *Thompson* vs. *Allen County*, 115 U. S., pages 550 to 565. Justice MILLER again delivered the opinion of the court.

Thompson had exhausted the power of the court of law by compelling the levy of a tax by Allen County, and found himself face to face with the old trouble—a vacancy in the office of collector.

He tried a bill in equity to have a receiver appointed to collect, or the Marshal or the court itself to collect its taxes. This case it seems coming from the same State, being a subscription under the same law and charter, ought to have been conclusive on the lower court.

The court said after reviewing all the cases:

"A *court of law possesses no* power to levy taxes. Its power to compel officers who are lawfully appointed for that purpose, in a case when their duty to do so is clear and is strictly ministerial, rests upon a ground very different from, and much narrower than that under which a court of chancery would act in appointing its own officer either to assess or collect a tax.

Court of law no power to appoint collectors.

"In the one case *the officer exists*, the duty is plain, the plaintiff has a legal right to have their officers perform that duty for his benefit, and the remedy is to compel this performance, namely: the writ of mandamus has been a well known process in the hands of the courts of common law for ages. In the other case *there exists no officer* authorized to levy or collect it when levied. The power to enforce collection when the tax is levied by *existing* officers is a common law power strictly guarded and limited to mere cases of ministerial duties, and is not one of the powers of a court of chancery. It would require in this court not a compulsory process against some existing officer to make him perform a recognized duty,

Can only compel existing officers to perform duty.

but the appointment by the court of such an officer, and a decree directing him what to do." "In one case his power proceeds from the law, and he is compelled to execute it; in the other it proceeds from the court which first makes a law and then makes an officer to enforce it. No such power has ever yet been exercised by a court of chancery. * * * If the common law court can compel the assessment of a tax, it is quite as competent to enforce its collection as a court of chancery. * * * Its sheriff or marshal is as well qualified to collect the tax as a receiver appointed by a court of chancery."

Cannot fill vacancy.

"The difficulty is, *that no power exists in either court to fill the vacancy in the office of tax-collector*, and the case of *Lee County* vs. *Rogers*, 7 Wallace, 175, where the laws of the State of Iowa allows the court to enforce its writ of mandamus by making such appointment the only case in which it has ever been done shows, that without such legislative authority, it cannot be done."

The court quoted, with approval, the 3d proposition agreed upon by the majority of the court in *Merriwether* vs. *Garnett*, 102 U. S., page 501.

"The power of taxation is legislative and cannot be exercised otherwise than under the authority of the legislature."

From these authorities we think it is clear—

1st. That a court of chancery has no power to appoint an officer to either levy or collect taxes;

2d. That a common law court has only the power by mandamus to compel existing officers to perform a ministerial duty in regard to their levy and collection;

3d. That neither has the power to fill a vacancy in the office or appoint anyone to discharge the duties

where a vacancy exists, or where the officer refuses to act:

4th. That in *Lee County* vs. *Rogers*, 7 Wallace, 175, a vacancy did not exist and was not filled, but the court exercised a power, given by the State of Iowa, to appoint some one to perform the duty of an existing officer upon whom process was served and who refused to perform a recognized duty when commanded by the court instead of proceeding against the officer by attachment.

An examination of the Code of Practice of the State of Kentucky, title 10, chap. 12, section 474 to 479 inclusive, published in 1883, will show that no such provision exists in the statutes of Kentucky, as that relied on in the Iowa case, *supra*, and none has been passed since that time.

But we insist again, that if such a provision existed, it only authorizes the court to appoint a commissioner to perform the duty of an existing officer, who has been served with process, who is in contempt of court by refusal to obey its judgment, and does not authorize the filling of vacancy, or the appointment of an agent of the court to perform the duties of an office, when there is no incumbent in contempt or in existence.

Further, that if the court should hold the office of collector was not vacant, there being no sheriff, but a collector of state revenue, then the proper remedy of Taft was against the collector and not against the judge, and the collector not being before the court his action against the judge should be dismissed.

The question naturally arises, what is this appointee of the court?

What is the effect of appointment?

Is he an officer of Taylor County, State of Kentucky, exercising the authority of the Kentucky law granted by the Legislature?

Or, is he the United States Marshal, armed with authority of federal legislation?

Or, does he derive his power simply from the judgment of the court, doing what the court ordered in the way he is directed?

The United States Marshal cannot be appointed a collector of Taylor County.

Article 8, Section 11, of the Constitution of the State of Kentucky, provides that—

State Constitution.

"All civil officers for the Commonwealth at large shall reside within the State, and all district, county or town offices within their respective districts, counties and towns (trustees of towns excepted) and shall keep their offices at such places therein as may be required by law."

Article 6, Section 2, requires officers to be residents two years of the State and one year of the county. Now, then who is the United States Marshal? Is this appointment that of a man, or of an incumbent? Do the United States Deputy Marshals take office and power as collectors of taxes in Taylor County? Even if the court had a right to fill the vacancy, if such exists, in Taylor County of collector, would not an appointment have to be made of some individual, and not of an office? The United States Marshal is a creation of the law; can a creation of the law fill a vacancy, if there be one?

There cannot be the slightest pretense that this appointment makes the United States Marshal an officer of Taylor County.

It looks idle to talk of the United States Circuit

Court appointing a State officer. State officers can only be elected or appointed under and by authority of the constitution and laws of the State, and the State has never delegated such authority to the Federal courts.

By accepting any office under the Federal Government the incumbent of any State office vacates it at once. (*Hogan* vs. *Carpenter*, 4 Bush., page 90, Ky. Reports.)

If the court can appoint a State officer it can remove one, and if it can appoint one it can appoint all, and remove one, remove all, thus the full power of the State completely subjected to the authority of the Federal judiciary.

If they do it one case they can do it in another, and thus we might have as many different men assuming the functions and performing the duties of an officer as there are courts assuming to appoint.

This very case illustrates the folly of the position. If there is "a collector of State revenue" for 1887 in Taylor County under the act of March 11, 1873, he is bound to collect the railroad tax, and is probably doing so; yet the unfortunate people of the county are doubly harrassed for the United States Marshal, with a swarm of deputies, is forcibly collecting the same tax under appointment of the court. A payment to one may not be respected by the other, each claiming the authority to the exclusion of all others.

Two collectors in Taylor County.

The position taken by the court in this judgment must be, that it can do anything necessary to collect a debt. Suppose the legislature fails to do its duty, will the court appoint one that will, or appoint the

United States Marshal to perform the duty for it? It has the same power in the one case as the other.

If the United States Marshal (Capt. Jack Gross) was to die or resign, would his successor become an officer of Taylor County, *ex-officio*?

Mind you: Gross was not appointed collector, the "United States Marshal" was.

Does the United States Marshal collect the taxes by virtue of his office of Marshal under Federal Legislation? No; there is no statute which authorizes him, passed by Congress, to collect taxes levied under State authority or Federal authority. He is not a tax collector.

Pay of Marshal.

There is no provision to pay him for such work, no fees fixed, no provision made. His remuneration is in the *discretion* of the County Court not to exceed six per cent. (Act of March 11, 1873, *supra*, section 3.)

There can be but one theory, that is that he is acting as the agent of the court, as its own officer, executing its judgment, in the way he is directed.

Then where did the court get its authority to collect taxes in the State of Kentucky. The highest court in that State has decided that taxes could only be collected in the way authorized by the legislature, and that no court had authority to do so. (81 Ky., 254.) And this court approved of that decision, and has time and again decided that courts of equity could not collect and apply taxes. (115 U. S., page 564.)

If the court is without authority, its agent must be.

But if the court had authority the judgment in

this case would be void for uncertainty, as to the time and manner of its execution.

Provisions of State as to collection of tax.

The statutes of Kentucky in the collection of taxes prescribe, 1st, The assessment; 2d, The levy; 3d, The time and manner of collection, all of which must be strictly followed.

Is the United States Marshal to collect on the assessors books of 1886 or 1887? The tax-payers are different, and the amounts assessed are different on each book or list.

The judgment does not say, how is he to get this list? It is in the custody of the County Clerk, who has no right to give it to him. Will he take it by force? Will he pay respect to the action of the Board of Supervisors? (General Statutes, State of Kentucky, page 724). How will he know what the Supervisors have done? The County Judge may reduce a tax-payers assessment, will he respect the judgment of the court? Will he levy tax receipts on property, advertise and sell it? Will he incur the penalties denounced by law for illegal levies and sales? On all his powers, and duties the judgment is silent, yet that judgment furnishes him his full measure of authority and directions. Does the simple statement that he is appointed collector to collect certain taxes, invest him with the powers granted by the legislature of Kentucky "to the sheriff, or other person collecting the State revenue," or to a "special tax-collector appointed and qualified by the County Court." If so, he does not derive his powers from the judgment, but from the law of Kentucky, whose officer he is. His powers in this case are from the court, which should have directed

him precisely what he is to do, and the time and manner of doing it.

Judgment void for uncertainty.

Suppose the court was to decree a sale of real estate, and appoint John Jones commissioner to sell it, giving him no further directions, the judgment would be void for uncertainty. (*Talbott* vs. *Banks*, 2 J. J. Marshall, 550, Ky. Reports.)

The only authority the marshal would have under this judgment (unless he becomes an officer of the State of Kentucky) would be to request payment of the tax-payers, if he could find out who they were and what they owe.

It has often been held that a receiver cannot institute a suit without authority from the court, so this agent of the court could only go as far as the judgment directed, and in the manner pointed out.

Payments in coupons.

Would he have authority to receive coupons under Sec. 18 of the act of 1870, *supra*, in payment of taxes? No. Yet such is the statute of the State. If the whole levy in this case was paid in coupons, where would defendant get his money?

The 9th error assigned is that the court erred in rendering judgment against Taylor County which was not before the court on the mandamus proceedings.

When, in the original case, judgment was rendered against Taylor County for the coupons, interest and cost, the proceeding was ended and Taylor County was out of court. The mandamus proceedings are not against Taylor County but against the Presiding Judge of the Taylor County Court, to compel him to perform an alleged manifest ministerial duty, therefore when the court offers to make a suspension of the judgment appointing the marshal as collector

when the defendant Taylor County shows itself willing and able to execute the judgment; and, again says, if it has not manifested its willingness and ability through its own officers to proceed in good faith to execute this judgment, the marshal shall proceed. It is manifest the court has found that the Presiding Judge has done his duty and that the mandamus must not issue against him, for the court cannot make him do any more than he has done, so the waters being sufficiently muddied, we find the court has directed by some unseen power its mandamus at Taylor County instead of the County Judge, which is an error. If the judge was in default enter a judgment compelling him to perform his manifest duty. If the judge is not in default the county is not; unless some other officer is, and the proceeding should be against the officer found to be in default not the county. Let the officer in default be coerced.

The 8th error assigned is that the court cannot render any judgment beyond compelling the County Judge to perform the manifest duty enjoined upon him by law.

What judgment can be rendered in mandamus case?

"The modern writ of mandamus may be defined to be a command issuing from a Common-law Court of competent jurisdiction in the name of the State or sovereign directed to some corporation officer or inferior court requiring the performance of a particular duty specified, which duty results from the official station of the party to whom the writ is directed or from operation of law. (High Extraordinary Legal Remidies § 1. Ibid. § 7.)

"An important feature of the writ of mandamus and one which distinguishes it from many other remedial writs is that it is used merely to compel action and coerce performance of a pre-existing duty. § 9.